

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SELIM ZHERKA,

Plaintiff,

- against -

PHILIP AMICONE, individually, and PHILIP  
AMICONE, in his capacity as Mayor of the City of  
Yonkers, New York,

Defendants.

No. 07 Civ. 9618 (CLB)

**AFFIDAVIT OF MARK A.  
FOWLER IN SUPPORT OF  
MOTION TO QUASH**

STATE OF NEW YORK     )  
                                      ) ss:  
COUNTY OF NEW YORK    )

MARK A. FOWLER, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and an attorney for non-party Gannett Satellite Information Network, Inc. ("Gannett"). I make this affidavit in support of Gannett's motion to quash three subpoenas, dated February 4, 2008, issued by plaintiff Selim Zherka in this case.

2. Gannett is publisher of The Journal News, a daily newspaper that is widely distributed throughout Westchester, Bronx, New York, Putnam, and Rockland Counties and in surrounding areas of New York and Southern Connecticut. The Journal News operates as a business division of Gannett and is not a separate entity.

3. In addition to the print versions of the newspaper, The Journal News operates a website, www.lohud.com, which contains, among other things, on-line community forums on which readers may post comments regarding news, opinion, or anything of public or community interest.

4. On or about February 5, 2008, a process server left three subpoenas duces tecum (the “Subpoenas”) at the front desk of The Journal News’s office in White Plains, New York. (See the accompanying Declaration of Roberta Maurer and Exhibit A thereto.) It is my understanding that Ms. Maurer is not authorized to accept service of process on behalf of Gannett or The Journal News, and thus the service of the Subpoenas was plainly ineffective.

5. The Subpoenas, issued on behalf of the plaintiff in this action, Selim Zherka, seek the production of documents that disclose the “(i) screen name, (ii) e-mail address, (iii) gender, (iv) year of birth, (v) home zip, and (vi) country [of residence]” of certain “bloggers” identified in the Subpoenas as “Ethan Edwards,” “Consultant,” and “Mob Buster” (the “Posters”).

6. Upon information and belief, plaintiff’s counsel contends that the Posters posted certain messages on a community conversation forum concerning local politics.

7. Despite the seeming invalidity of the service of the Subpoenas, on February 11, 2008, Barbara Wall, an attorney for Gannett, contacted Jonathan Lovett, the attorney for Mr. Zherka, and asked him to withdraw the Subpoenas. Ms. Wall explained that she believed that Mr. Zherka was obliged to make a showing of necessity and legal merit before obtaining personally identifying information concerning website postings by anonymous speakers. Ms. Wall also sent Mr. Lovett a copy of Greenbaum v. Google, Inc., 845 N.Y.S.2d 695 (Sup. Ct. N.Y. County 2007), holding that, in the absence of such a showing, a party was not entitled to compel pre-action discovery of such information.

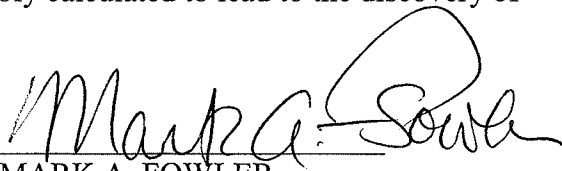
8. On February 13, 2008, Mr. Lovett sent an email to Ms. Wall advising her that the case law she had sent him had not persuaded him to withdraw the Subpoenas. He told Ms. Wall that The Journal News should either comply with the subpoena or move to quash “this week.”

9. Later that same day, my firm was retained as counsel in this matter, and we served Mr. Lovett by facsimile and by overnight delivery with a series of objections to the Subpoenas. (A copy of the objections is annexed hereto as Exhibit A.)

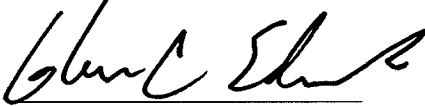
10. The Journal News submits that, under FRCP 45, the service of objections places the burden on Mr. Zherka to move to compel discovery. It is not The Journal News’s burden to move to quash or for a protective order. On February 14, 2008, I placed two calls to Mr. Lovett in order to ask him to agree to a reasonable, stipulated briefing schedule on a motion to compel. I was unable to get through to Mr. Lovett, and he did not return my calls. However, because this is a legal issue of importance that involves the constitutional protections for anonymous speech and rights of privacy, The Journal News has decided to file this expedited motion to quash pursuant to FRCP 45.

9. We respectfully advise the Court that The Journal News does not have – and never had – much of the information sought by the Subpoenas. Specifically, posters to the online forum are not asked to provide their gender, year of birth, home zip code, or their country of residence. Posters are asked to provide an email address, but, as a practical matter, such email addresses are not always valid. Additionally, Mr. Lovett already has the screen names he is requesting, which are set forth in the Subpoena itself. Finally, we are advised by Ms. Wall that Mr. Lovett said he has already determined the identity of at least one of the Posters. Under these circumstances, it seems unlikely that

the Subpoenas are necessary or even reasonably calculated to lead to the discovery of admissible evidence.

  
MARK A. FOWLER

Sworn to before me this  
14<sup>th</sup> day of February, 2008



Notary Public

